U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 16Jul2002

Case No.: 2001-STA-0059

In the Matter of:

OSCAR SIMPKINS
Complainant,

v.

RONDY COMPANY, INC.,
Respondent.

Appearances:

Oscar Simpkins
Pro se

Deborah Casey Brown, Esq.
For Respondent

Before: DANIEL A. SARNO, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This case arises under the employee protection provisions of Section 405 of the Surface Transportation Assistance Act (the "STAA") of 1982, 49 U.S.C. § 31105, and the implementing regulations at 29 C.F.R. Part 1978. Oscar Simpkins ("Complainant") claimed that his employer, Rondy Company, Inc. ("Respondent"), violated Section 405 by terminating his employment in response to his being engaged in protected activity pertaining to commercial motor vehicle safety. This matter is before me on the Complainant's request for hearing and objection to findings issued on behalf of the Secretary of Labor by the Regional Administrator of the Department of Labor's Occupational Safety and Health Administration (OSHA) after investigation of the complaint. *See* 49 U.S.C. § 31105(b)(2)(A); 29 C.F.R. § 1978.105.

A formal hearing was held on December 11, 2001 in Columbia, South Carolina. Complainant offered exhibits PX 1 through PX 5, Respondent offered exhibits DX 1 through DX 12, and both

parties offered joint exhibit JX 1.[1] Complainant did not submit a brief, but on December 21, 2001, the court received a letter from Complainant describing alleged damages and a request for compensation. On October 18, 2001, Respondent submitted a brief. After consideration of the entire record and the arguments of the parties, I concur with the Secretary's findings and recommend that the complaint be dismissed.

Stipulations

Complainant and Respondent stipulated to the following findings of the Secretary:

1. Respondent, Rondy Co., Inc., is engaged in interstate trucking operations and maintains a place of business in Barberton, OH. In the regular course of this business, Respondent's employees operate commercial motor vehicles in interstate commerce principally to transport recyclable materials. Consequently, Respondent is a commercial motor carrier and subject to the STAA.

2. Respondent is now and, at all times material herein, has been an employer as defined in Section 31101(3) of the STAA (49 U.S.C. 31101(3)).

3. Complainant, Oscar Simpkins, was originally hired as a driver of commercial motor vehicles, with gross vehicle weight rating in excess of 10,001 pounds. Complainant is currently unemployed.

4. At all times material herein, Oscar Simpkins, was an employee in that he was a driver of a commercial motor vehicle having a gross vehicle weight rating of 10,001 pounds or more used on the highways to transport recyclable materials and in that he was employed by a commercial motor carrier and, in the course of his employment, directly affected commercial motor vehicle safety. (Section 31101 (2) of the STAA, 49 U.S.C. 31101 (2)).

5. On or about November 20, 2000, Complainant, Oscar Simpkins, filed a complaint with the Secretary of Labor alleging that Respondent had discriminated against him in violation of Section 31105 of the Act (49 U.S.C. 31101). This complaint was filed timely.

[1] The following abbreviations will be used as citations to the record:
PX - Complainant's Exhibit
DX -Respondent's Exhibit
JX - Joint Exhibit
Tr - Transcript

6. The Secretary, acting through her duly authorized agents, thereafter investigated the above complaint in accordance with Section 31105 (b)(2)(A), and has determined that there is reasonable cause to believe that Respondent has not violated Section 31105 of the STAA.

7. Complainant Oscar Simpkins alleged he was discharged in reprisal for complaining to management about unsafe commercial motor vehicles. Respondent denied Complainant's allegations.

8. Complainant began work with Respondent on or about July 5, 2000, as a truck driver. Complainant alleged that shortly after he began working, he began to raise safety concerns to Respondent management regarding the truck he was driving.

(Tr. 7, JX 1). The parties further stipulated:

9. Complainant engaged in protected activity under the STAA. (Tr. 8).

10. Respondent was aware that Complainant was engaged in protected activity. (Tr. 9).

11. Respondent subjected Complainant to adverse action. (Tr. 8)

(Tr. 7, JX 1).

Issue

1. Whether Respondent terminated Complainant's employment based on Complainant's commercial motor vehicle safety complaints in violation of Section 405 of the STAA.

Findings of Fact and Conclusions of Law

Respondent is a small recycling company. (Tr. 24-25). On July 5, 2000, Respondent hired Complainant to work as its only truck driver. (Tr. 24). This position required Respondent to drive a dump truck, operate a tractor and trailer rig, as well as assist in the loading of "buffings"[2] into the dump truck. (Tr. 123). Complainant was a probationary employee for the entire period of his employment. (Tr. 47, 66-67). According to company policy, new employees with this status could be terminated within the first 90 days of their employment after receiving a single written warning. (Tr. 122).

During his employment, Complainant's supervisor was maintenance supervisor Robert Gordon. (Tr. 121). At the time of the hearing, Mr. Gordon had been employed by Respondent for

[2] Buffings are rubber residue from the tire recycling process. (Tr. 145).

over eleven years. (Tr. 120). Mr. Gordon eventually recommended that Complainant's employment be terminated based on a series of problems with Complainant's work performance. (Tr. 181).

Several of these problems involved Complainant's failure to complete his driver's log. Complainant was required, as a driver, to inspect the trucks both before and after his trips. (DX 1). Based on these inspections, Complainant was to complete a "Driver's Daily Log" sheet. (Tr. 64, DX 1). The back side of this sheet also contained the "Driver's Vehicle Inspection Report" which is used to record safety problems with a truck and must be completed pursuant to Department of Transportation regulations. (Tr. 64, DX 1, DX 11, DX 12). Respondent's employee manual provided a detailed description of how to perform these inspections and explained that the log is the proper place to note any problems with a truck. (DX 1). The manual also stated that a failure to properly complete the log can result in termination. (DX 1). Respondent's office manager reviewed with Complainant how to complete this paperwork. (PX 3). Complainant testified that he was aware of these requirements. (Tr. 64).

Of Complainant's approximately 50 trips, Complainant signed only one inspection report. (Tr. 66). Respondent submitted into evidence two of Complainant's driver's log sheets, each with its inspection report left completely blank. (DX 11, DX 12). In defense, Complainant stated that, while he failed to fill out the inspection reports, he regularly completed the front portion of the daily log. (Tr. 61). In addition, Complainant maintained that Respondent did not notify him of his record keeping violations until after his employment was terminated. (Tr. 26). Complainant stated that, until this point, Respondent did not "bring that up," and that it was not "an issue with them." (Tr 64).[3]

A second problem involved Complainant's absence from work on two days. Respondent required its employees to telephone the office at the beginning of each shift from which they will be absent. (Tr. 169). Complainant was absent from work on August 7, 2000 and August 8, 2000. (DX 2). Respondent's home office determined that Complainant failed to properly call in on these days. (Tr. 169). On August 16, 2000, Respondent gave Complainant a written warning for an "unacceptable call off." (DX 2, Tr.168). Complainant disputed the violation, believing that he had followed proper procedures. (Tr. 168, DX 2).

An ongoing problem involved Complainant's failure to weigh the dump truck prior to returning from a trip. (Tr. 94). While Complainant knew that weighing the truck was important, he testified that the scale house was sometimes closed, thus precluding him from completing his job. (Tr. 95). Mr. Gordon testified that the scale house was normally open until five o'clock and that Complainant usually left work at four o'clock. (Tr. 141). Mr. Gordon further stated that whenever it got close to four o'clock, Complainant "acted like it was time for him to go." (Tr. 141). Mr. Gordon was

[3] Complainant also did not properly mark on several reports his total mileage driven out of state. (Tr. 81). While Complainant admitted to this mistake, the total mileage was evident by subtracting the noted odometer readings. (Tr. 82).

convinced that on some of these occasions the scales were still open. (Tr. 141). Nevertheless, Complainant was not given a written warning for failing to weigh the dump truck. (Tr. 141-42).

Another ongoing problem involved damage to Respondent's trucks. In July 2000, the drive shaft of a truck broke while Complainant was driving. (Tr. 83, DX 5). Mr. Gordon believed that the drive shaft broke because Complainant drove the truck before building up sufficient air pressure to release the brakes. (Tr. 83, 127). Complainant believed that the drive shaft broke as a result of "bad equipment." (Tr. 83-84).

By way of another employee's report, Mr. Gordon learned about damage to the front end fender and bumper of the dump truck. (Tr. 93, 138, DX 9). Complainant stated that while he was responsible for some of the damage, he did not cause all of the damage. (Tr. 93).

Complainant twice returned a truck with a bent exhaust pipe. (Tr. 92, 129). The second time that this happened resulted in the required replacement of the entire exhaust system. (Tr. 132, DX 6). Complainant's explanation for the damage was that "[t]he equipment was no good." (Tr. 92).

During Complainant's employment, a truck's clutch had to be adjusted three times. (Tr. 173). In October 2000, the truck's clutch and its universal joint required replacement. (Tr. 85, DX 7). Mr. Gordon stated that this damage resulted from Complainant changing gears while in "high range transmission." (Tr. 125). Mr. Gordon testified that he saw Complainant changing gears in this way, having observed his truck move up and down and smelled the clutch burning. (Tr. 124-25). Complainant acknowledged that changing gears in this way could damage a truck's transmission, but denied that he had done so. (Tr. 86, 125).

Complainant did not receive a written warning for any equipment damage. (Tr. 127). Mr. Gordon testified that, at the time, Complainant was a new employee and that he wanted to give Complainant the "benefit of the doubt." (Tr. 127).

Despite all of these problems, a final incident was, perhaps, the most consequential. On October 6, 2000, Complainant returned in the afternoon with his truck very low on fuel. (Tr. 34). Complainant usually waited until the following morning to refill the tank. (Tr. 33-38). Complaint did not fill up on this particular afternoon either, though the gas station remained open. (Tr. 34-37). The following morning, Mr. Gordon was attempting to position the truck for unloading, when the engine shut down before the brakes could be released. (Tr. 129). Mr. Gordon was forced to carry thirty gallons of fuel from the gas station back to the truck. (Tr. 129). The truck had a diesel engine, requiring that Mr. Gordon prime and bleed the fuel system before the truck could be restarted, a process that took over two hours. (Tr. 129). There was no company rule requiring that trucks be brought back with adequate fuel, but Mr. Gordon testified that Complainant's behavior went against "common sense." (Tr. 130). Complainant received a written warning for this incident. (Tr. 90, DX 3). Complainant signed the warning, acknowledging that he had read and understood the notice. (DX 3).

At this point, Mr. Gordon had "had enough." (Tr. 148-49). Mr. Gordon contacted the home office to complain about Complainant's job performance. (Tr. 149). Given the ongoing problems, Mr. Gordon believed that Complainant was not satisfactorily performing his job and Mr. Gordon recommended Complainant's termination. (Tr. 152, 180). Mr. Gordon testified that Complainant's employment probably would not have been terminated absent his recommendation. (Tr. 181). Mr. Gordon stated that the home office "pretty much took it over from there." (Tr. 149). Complainant's employment was terminated on October 10, 2000, just before the end of his probationary period. (Tr. 31, DX 4).

Complainant alleged that his dismissal came as a resulted of his complaints about truck safety. Complainant did not maintain, however, that he refused to drive a truck because of safety concerns. (Tr. 106-107, 153). Moreover, Complainant only once noted a defect on his inspection report. (Tr. 100, 104).

The major complaints involved the condition of Respondent's tires. (Tr. 96). Respondent purchased its recapped tires from a tire manufacturer. (Tr. 136). In response to complainants about the condition of the tires, Mr. Gordon or a mechanic would perform an inspection. (Tr. 134). Respondent sometimes repaired or replaced the tire, but at other times Respondent took no action. (Tr. 97-99). On Complainant's first day of work, Complainant complained about the condition of a tire and then experienced a blowout on his subsequent trip. (Tr. 44, 97). This blowout, however, did not involve the particular tire which Complainant had reported. (Tr. 136). Complainant had a heated argument with Mr. Gordon after another of these blowouts, but the tire was later fixed. (Tr. 44, 106). At a later point, Complainant had a third blowout. (Tr. 44). However, Mr. Gordon testified: "If the tire was not good, [Complainant] did not go in a truck. I didn't want anybody driving an unsafe vehicle." (Tr. 143). Mr. Gordon admitted to other incidents when drivers had blown out tires and suggested that blowouts were quite common on trucks. (Tr. 155-56).

Complainant also raised two minor issues. The first involved the conveyor on the dump truck. Mechanic Wesley Turnage wrote a letter on Complainant's behalf stating: "I drove the dump truck (in very unsafe condition) to go to different towns and pick up buffings, which really should have had two people to work with the conveyor, because of the bad shape it was in." (PX 1). Mr. Gordon conceded that the conveyor was badly worn, but that a replacement could no longer be obtained from the manufacturer. (Tr. 133). Mr. Gordon realized that the worn conveyor made this job more difficult and testified that he did not hold Complainant's complaints against him. (Tr. 147). The second issue involved the interior light in one of the trucks. (Tr. 134). Mr. Gordon inspected the light after each complaint, but could not find anything wrong with it. (Tr. 134).

Mr. Gordon testified that Respondent's equipment was generally well maintained. (Tr. 133). Mr. Gordon also testified that whenever any problem with a truck was mentioned he always inspected the equipment. (Tr. 144-45). In addition, Mr. Gordon noted that the trucks are maintained according to a monthly mileage service plan. (Tr.133).

Complainant testified that a regional manager had repeatedly commended his job performance. (Tr. 42-43, PX 2). Complainant believed that he had completed his work duties to the best of his ability. (Tr. 43). Complainant had a good work history and he offered testimony that he was a hard-working and honest worker. (Tr. 43, PX 4, PX 5). Complainant's pastor Carl Wells also testified that Complainant was strongly committed to his family and had shown a positive ethic in the work which he had performed for the church. (Tr. 116). Mr. Wells had no first hand-knowledge, however, of any of the activities that took place during Complainant's employment with Respondent. (Tr. 118-19). Complainant began a new job as a driver with a different company beginning in April 2001.

Analysis

Complainant failed to prove discrimination under the STAA. While Respondent acknowledged that Complainant engaged in protected activity, and that it took adverse action, Complainant failed to prove that the protected activity was the cause of Respondent's decision to take adverse action. Even assuming that Complainant could meet this burden, Respondent offered legitimate nondiscriminatory reasons for the adverse action. Complainant did not show that these reasons were a pretext for discrimination. Consequently, I recommend that the complaint be dismissed.

Congress passed the STAA in 1982 to fight the "increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents." *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987)(quoting remarks of Sen. Danforth at 128 Cong. Rec. 32509, 32510 (1982)). *See also, Yellow Freight Systems, Inc., v. Reich*, 8 F.3d 980, 984 (4th Cir. 1993) ("Congress enacted the STAA to promote safe interstate commerce of commercial motor vehicles.") *quoting Lewis Grocer Co., v. Holloway*, 874 F.2d 1008, 1011 (5th Cir. 1989). The STAA attempts to fulfill this goal, in part, by prohibiting discrimination against trucking employees who complain of commercial motor vehicle rule violations by trucking companies. *See* 49 U.S.C. § 31105(a); *Brock*, 481 U.S. at 258; *Yellow Freight*, 8 F.3d at 984.[4] The employment discrimination jurisprudence governing Title VII also governs actions under the STAA. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

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[4] Section 405 of the STAA provides:

> (1) A person may not discharge an employee or discipline or discriminate against an employee regarding pay, terms, or privileges of employment because
> (A) the employee, or another person at the employee's request, has filed a complaint or begun a proceeding related to a violation of a commercial motor vehicle safety regulation, standard, or order, or has testified or will testify in such a proceeding; or
> (B) the employee refuses to operate a vehicle because
> (i) the operation violates a regulation, standard, or order of the United States related to commercial motor vehicle safety or health; or
> (ii) the employee has a reasonable apprehension of serious injury to the employee or the public because of the vehicles's unsafe condition.

49 U.S.C. § 31105(a).

A. Complainant's *Prima Facie* Case

To establish a *prima facie* case of discriminatory treatment under the STAA, the complainant must prove: (1) that he engaged in protected activity; (2) that he was the subject of adverse employment action; and (3) that a causal link exists between his protected activity and the adverse action of the employer. *See BSP Trans, Inc., v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir. 1998); *Moon v. Transport Drivers, Inc*., 836 F.2d 226, 229 (6th Cir. 1987). *See also, Burdine*, 450 U.S. at 253-54. Respondent did not contest that Complainant engaged in protected activity nor that it subjected Complainant to adverse employment action. The record clearly supports a finding that Complainant repeatedly complained about vehicle safety problems and that Respondent issued two written warnings and terminated Complainant's employment. The third element of the prima facie case, consequently, is the only matter at issue.

In establishing the third element, the complainant must show, at the minimum, evidence sufficient to raise an inference of causation. *See Carroll v. J.B. Hunt Transporation*, 91-STA-17, slip op. at 2 (Sec'y June 23, 1992)(upholding ALJ finding that complainant's engaging in protected activity was not any part of employer's motivation for discharge). The complainant must show that the employer was aware of the protected activity at the time it took the adverse action. *See Osborn v. Cavalier Homes*, 89-STA-10, slip op. at 2 (Sec'y July 17, 1991). An inference of causation may be raised if the adverse action is close in time to the protected activity. *See e.g., Bergeron v. Aulenback Transportation, Inc.*, 91-STA-38 , slip op. at 3 (Sec'y June 4, 1992)(concluding that inference raised when discharge immediately followed protected activity); *McNairn v. Sullivan*, 929 F.2d 974, 980 (4th Cir. 1991)(finding causal connection where employee fired immediately after bringing lawsuit).

Complainant believed that Respondent operated poor quality equipment. Complainant specifically complained about Respondent's tires, the condition of the dump truck conveyor, and the interior light of one truck. Respondent does not dispute that it was aware of the complaints. The purpose of this proceeding, however, is not to decide whether the complaints were accurate or justified. The relevant question, instead, is whether the complaints were the cause of Respondent's decision to terminate Complainant's employment.

Complainant failed to present sufficient evidence to raise an inference of causation. There is no indication that the complaints generated any animosity on the part of Respondent. While Complainant and Mr. Gordon had an argument following a tire blowout, the tire was subsequently repaired, and the incident did not lead to any negative action. In fact, Respondent made inspections after every single complaint, and promptly made any repairs it believed to be required. Contrary to his theory, moreover, Complainant regularly failed to complete his own inspection reports, calling into question his purported concern for vehicle safety.

Furthermore, the record does not indicate that the complaints and the adverse action were close in time. The complaints occurred on his first day of employment and then at unspecified

times during the following three months. In contrast, Respondent issued to Complainant his first written warning immediately following his alleged improper absence from work. Respondent issued to Complainant his second written warning immediately following his failure to refuel the truck. Respondent terminated Complainant's employment immediately following issuance of the second written warning. This pattern of events defeats a suggestion that the complaints were the cause of the adverse action.

The record simply does not reflect that the complaints, however justified, led to Respondent's decision to terminate Complainant's employment. Consequently, Complainant has failed to prove a causal link between his protected activity and the adverse action.

B. Respondent's Rebuttal

Even assuming that Complainant could present sufficient evidence that his protected activity is causally linked to the adverse action, Respondent would still prevail. Once the prima facie case is established, the burden of production shifts to the employer to present sufficient evidence to rebut the inference of discrimination. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507 (1993). The employer must articulate a legitimate, nondiscriminatory reason for its employment decision. *See id.* If the employer presents evidence of a nondiscriminatory reason for the adverse employment action, the complainant must prove by a preponderance of the evidence that the reason proffered by the employer is a mere pretext for discrimination. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). To prove that the proffered reason is pretextual, the complainant must prove both that: (1) the asserted reason is false; and (2) that discrimination was the true reason for the adverse action. *See Hicks*, 509 U.S. at 2752-56.

Respondent offered a litany of legitimate nondiscriminatory reasons for its discipline and termination of Complainant's employment. Respondent alleged that Complainant failed to properly complete his paperwork, did not appropriately report absences from work, regularly neglected to weigh the dump truck, damaged company equipment on several occasions, and returned a truck with inadequate fuel. The United States Supreme Court held in a similar discrimination case that an employee "ought not to be able, by engaging in such [protected] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record . . ." *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 286 (1977). In accordance with this principle, Respondent was free to assess Complainant's performance record when deciding whether to retain Complainant as an employee. Respondent's proffered reasons for terminating Complainant's employment are legitimate and well-supported by the record. The fact that Complainant engaged in protected activity cannot insulate him from this workplace decision.

In response, Complainant did not offer any evidence that the nondiscriminatory reasons were a pretext for discrimination. Complainant admitted to failing to complete his paperwork, to having partially damaged the truck, and to having returned the truck low on fuel. Complainant disputed only minor details of the other allegations. Respondent's course of discipline is

documented by two written warnings, one of which predates his termination by over two months. Complainant offered no evidence that his complaints were the true reason for the adverse action.

Conclusion

Complainant failed to prove a *prima facie* case of discrimination under the STAA. While Respondent acknowledged its awareness of Complainant's protected activity, and that it took adverse action, Complainant failed to prove a causal link between the protected activity and the adverse action. At any rate, Respondent offered several legitimate nondiscriminatory reasons for the adverse action. Complainant did not prove that these reasons were a pretext for discrimination.

Each party presented its side of the story. In the end, it was not shown that Respondent terminated Complainant's employment because of his safety complainants. While the question resolved by this proceeding is narrow and specific, one need not be indifferent to the other issues raised. Losing a job can impose a hardship on workers and their families. An employer's decision to dismiss an employee may sometimes appear unfair. This, nevertheless, is not the venue for resolving these concerns. Based on the laws requirements, and the facts as they have been presented, I cannot offer a remedy to Complainant.

RECOMMENDED ORDER

It is hereby ORDERED that the complaint filed in this matter is DISMISSED.

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Daniel A. Sarno, Jr.
Administrative Law Judge

NOTICE: This Recommended Decision and Order and the administrative file will be forwarded for review to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Ave., Washington D.C. 20210. *See* 29 C.F.R. § 1978.109(a); 61 Fed. Reg. 19978, 19982 (1986).

DAS/dmj